

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 340 OF 2006

BETWEEN:

BEACON INSURANCE CO. LTD

Claimant

V

FITZ JACKSON

Defendant

Appearances:

Mr. Joseph Delves for the Claimant

Mr. Richard Williams for the Defendant

2007: January 17
 : May 11

JUDGMENT

[1] **THOM, J:** By fixed Date Claim filed on August 8, 2006 the Claimant Beacon Insurance Company Limited sought the following declarations:

- (i) That it is entitled to avoid the policy of insurance issued to the insured because of the false representation of fact made by the latter.
- (ii) That it is entitled to avoid the policy of insurance because it was obtained by the non-disclosure of material facts.

[2] The Claimant alleges that the Defendant through his agent Ms. Richards represented that the other driver of the Defendant's vehicle Mr. Leon Payne was born on November 10, 1971 when in fact Mr. Leon Payne was born on November 10, 1979.

[3] The Defendant alleges that it was the Claimant's agent who determined that Mr. Leon Payne was born in the year 1971 and inserted that information in the other driver declaration form.

BACKGROUND

[4] The Claimant is an insurance company. The Defendant is the owner of a passenger van registration number H3201. In 1999 the Claimant issued a motor vehicle insurance policy in relation to the said vehicle in the name of the Defendant. On April 24, 2003 the employee of the Defendant Mr. Leon Payne was added as an "other driver" to the insurance policy. The vehicle was involved in an accident in 2003 while being driven by Mr. Leon Payne. The Defendant made a claim on the insurance policy. The Claimant refused the claim on the grounds of misrepresentation and material non-disclosure.

ISSUES

[5] The parties agreed that the issues to be determined by the Court are:

- (i) Who wrote the year 1971 on the "other driver" declaration form.
- (ii) Whether the person who wrote the year 1971 was the agent of the Claimant or the Defendant and if agent of the Claimant what would be the legal effect.

EVIDENCE

[6] The witness Mrs. Ondine Ashton-Samuel testified on behalf of the Claimant, Mr. Leon Payne Mrs. Merlene Richards and Mr. Fitz Jackson testified on behalf of the Defendant.

ONDINE ASHTON-SAMUEL

- [7] The evidence of Mrs. Ondine Ashton-Samuel is that she is employed by the Claimant as an insurance clerk for the past nine years. She received the "other driver" Declaration form from a lady who she identified as Mrs. Merlene Richards and who often attended the Claimant's office with the Defendant and who often conducted the Defendant's business when he was not present. Mrs. Samuel agreed that she wrote "everyday" in paragraph 3 of the form after she had enquired of Mrs. Richards how often Mr. Payne would be driving the vehicle and Mrs. Richards told her everyday. She also inserted the date "24.4.03" on the form that being the date the Claimant added Leon Payne's name to the insurance policy. She specifically denied that she wrote the year "71" as the year of birth of Mr. Leon Payne. The witness also denied that she asked Mrs. Richards how old Mr. Payne looked. The witness further stated that the Claimant does not extend coverage to other drivers under Twenty-five (25) years.
- [8] Under cross-examination the witness agreed that she would sometimes assist persons with filling out the proposal form. That was one of her duties. She also agreed that paragraph 4 (b) of the form which deals with the date of issue of the drivers licence was changed by an employee of the Claimant one Mr. Aaron John after the vehicle was involved in the accident. She testified that she could not recall if Mrs. Richards completed the form in her presence. She also could not recall if she filled in the information "everyday" and the date while at the front desk when Mrs. Richards gave her the form. She could not recall whether the form was blank except for the signature of Leon Payne when first handed to her. She could not recall telling Mrs. Richards the balance of the form had to be filled out. She denied that she asked Mrs. Richards how old Mr. Payne looked and Mrs. Richards stated in his "twenties or thirties". She denied that she filled in "71" in paragraph 1 on the form. The witness agreed that the date on paragraph 4 (b) of the form was erased and a new date inserted. She agreed that when the form was handed to her the date was not erased. The witness stated that Mr. John was the person who erased it after the claim was made. She was not certain what date was on the form when she received it.

LEON PAYNE

- [9] This witness testified that he obtained a “H” Driver’s Licence on the 9th May, 2001. He first met the Defendant and Mrs. Richards when they hired him to work for them in 2003. He stated he was asked to sign his name on the form. He was not asked to provide any other information.
- [10] Under cross-examination the witness stated he was born on the 10th day of November, 1979. The Defendant did not enquire of his age. He showed the Defendant his driver’s licence but the licence did not contain his date of birth. He could not recall the Defendant asking him for any document which showed his age.

MERLENE RICHARDS

- [11] This witness testified that she conducts the business of the Defendant. Mr. Leon Payne was hired to drive the Defendant’s motor vehicle in 2003. She went to the Claimant’s office to have the name of Leon Payne added to the insured policy. The form was only signed by Leon Payne. She was advised by Mrs. Samuel to fill out the form and she did so. She did not insert the year of birth of Mr. Leon Payne. She did not know the exact year in which he was born. She ascertained the day and month from the licence since it is payable on the birthday. Mrs. Samuel asked her how old Mr. Payne looked and she told her he looks in his twenties or early thirties but she did not know the exact year in which he was born. She saw Mrs. Samuel insert “71” on the form and also inserted the words “everyday” after Ms. Samuel enquired of her how often Leon Payne would be driving the vehicle and she told her everyday. She also saw Mr. Samuel insert “no” at paragraphs 6 and 7 of the Form.
- [12] Under cross-examination the witness agreed that she knew the Claimant would want to know about the person who would drive the vehicle. She took the driver’s licence of Leon Payne to the Claimant. She also knew they would want to know about the driver’s age and experience. She did not know Mr. Payne’s age and she did not enquire of Mr. Payne what was his age. She denied that she wrote “71” as the year of Mr. Payne’s birth. She

reiterated it was Mrs. Samuel who wrote "71" in her presence after Mrs. Samuel inquired of her how old Leon Payne looked and she told her twenties to thirties. She agreed that she wrote the Defendant's name after Mrs. Samuel wrote "71". She also agreed that she accepted the information as correct.

FITZ JACKSON

- [13] This witness testified that he first knew Mr. Payne in 2003. The information in relation to paragraph 17 on the Proposal form was not on the form when he signed it in 1999. At that time he did not know Mr. Payne.
- [14] Under cross-examination the witness testified that he authorized his wife to conduct his business. He did not enquire of Mr. Payne what was his date of birth.

ISSUE NO. 1 WHO INSERTED THE YEAR 1971

- [15] Having seen and heard both Mrs. Samuel on behalf of the Claimant and Mrs. Richards on behalf of the Defendant. I believe the testimony of Mrs. Richards on behalf of the Defendant. Mrs. Samuel could not recall many aspects of the transactions. She could not recall whether the form was not filled out but only signed by Mr. Payne when it was handed to her. She also could not recall telling Mrs. Richards the balance of the form had to be filled out. She also could not recall seeing Mrs. Richards filling out the form. I believe the testimony of Mrs. Richards that it was Mrs. Samuel who wrote "71" on the form. Further having seen and examined the original form which was admitted into evidence. I find that the colour of ink on "71" is clearly different from the other information filled in by Mrs. Richards. Also the evidence shows that the Claimant tried to conceal facts in this case by changing information on the form after a claim on the policy was made by the Defendant. The Claimant should desist from this dishonest practice.

ISSUE NO. 2 WHOSE AGENT WAS MRS. SAMUEL WHEN SHE FILLED OUT THE FORM

- [16] Learned Counsel for the Claimant submitted that even if the Court believed the evidence of Mrs. Richards, Mrs. Samuels was not the agent of the Claimant. The Defendant knew or

ought to have known that the statement was untrue and alternatively that the Defendant was negligent when he gave the statement, declaration and proposals. Mrs. Richards agreed that she knew the importance of the age of the driver but neither Mrs. Richards nor the Defendant sought to ascertain the age of the driver Leon Payne.

[17] Learned Counsel for the Claimant referred the Court to several authorities including Birds Modern Insurance Law 6th ed. 2004; Biggar v Rock Life Assurance Co. [1902] 1KB 556.; The Law of Insurance contracts by Malcolm Clarke 2005. Learned Counsel urged the Court to distinguish the present case from the case CLICO International General Insurance Ltd. v Matheson on the following grounds

- (i) In Matheson there was a history of long personal knowledge of the insured by the agent.
- (ii) The agent knew the building was a wooded building, he had insured the building with other insurers.

Learned Counsel further submitted that the actual or ostensible authority of the agent cannot be the determinant factor of the issue in every case. Mrs. Samuel was not an agent to know.

[18] Learned Counsel for the Defendant submitted that Mrs. Samuel was the agent of the Claimant who had authority to complete proposal form and she inserted the year 1971 as the year of birth of Leon Payne. This information was not provided by the Defendant's Agent Mrs. Richards. Learned Counsel referred the Court to the decision of the Court of Appeal in Matheson's case.

Law

[19] It is settled law that an insurance contract is a contract uberrimae fidei. It is a contract that is based on the utmost good faith and if the utmost good faith is not observed by either party the contract may be avoided by the other party.

- [20] In Halsbury Laws of England 4th ed. Vol 25 paragraph 392 under the rubric “Imputation of Agent’s knowledge” the Learned Authors stated as follows:

“Imputation to principal of agents knowledge. The rules governing the imputation of the agent’s knowledge to the insurers are inherent in the general principles of the law of agency. Accordingly, before any question of imputed knowledge can arise, it must be established that the person possessing the knowledge was acting in the capacity of the insurers’ agent in the transaction affected and that it was his duty in that capacity either to place at the insurers’ disposal knowledge which he in fact has of certain matters, however it may have been acquired, or to acquire on their behalf knowledge of certain matters. If the agent in fact has knowledge of relevant matters, it will normally be imputed to the insurers without any question. Even if the knowledge has come to the agent while acting in a distinct capacity, it will be imputed to the insurers if it would be a breach of the agent’s duty, as an agent, to withhold it. If the truth as to relevant matters ought to have been ascertained by the agent from his own inquiries in the performance of his duty, the insurers are precluded from setting up their own agent’s misconduct in failing to make the necessary inquiries; they will be treated as knowing what they would have known if their agent had performed his duty...”

- [21] In Matheson’s case the Court of Appeal had to determine whether the employee of CLICO who completed the proposal form was the agent of the Mathesons or the agent of CLICO. Sander CJ (ag) as he then was after reviewing the Court of Appeal decisions of Newsholme Brothers v Road Transport and General Insurance Co. Ltd. [1929] 2KB p. 356 and Stone v Reliance Mutual Insurance Society Ltd [1972] 1 Lloyd’s Law report stated at paragraph 15:

“ Both Newsholme Brothers and Stone are decisions of the English Court of Appeal. Stone is later in time. It seems to me that a sensible way of reconciling these cases is to consider the actual or ostensible authority of the agent . In Newsholme the agent had no authority to complete the form. In Stone he had that authority.”

- [22] In determining whether the agent was the agent of the Matheson’s or CLICO the Court of Appeal did not only consider whether the agent had authority to complete the form but also the fact of the relationship between the agent and the Matheson and also the fact that the Agent was an “agent to know” in the context in which that expression is used in the case of Taylor v Yorkshire Insurance Co. [1913] 2 IR p 21.

[23] The case of Biggar referred to by Learned Counsel for the Claimant can be distinguished from the present case in that in Biggar the agent was acting outside the scope of his authority.

[24] In the present case it is not disputed that Mrs. Samuel had authority to complete proposal forms.

[25] The relationship between the Defendant and Mrs. Richards on the one hand and Mrs. Samuel on the other hand is described in paragraph 4 of the witness statement of Mrs. Samuel as follows:

“I received the form from a lady whose name I do not know, but who often and regularly attended the Claimant’s office with the Defendant and often conducted the Defendant’s business when he did not attend personally.”

[26] I find there was no special relationship between the Defendant and Mrs. Richards and Mrs. Samuel. Mrs. Samuel was familiar with the Defendant and Mrs. Richards and she was aware that Mrs. Richards conducted the Defendant’s business.

[27] Was Mrs. Samuel an “agent to know”? Mrs. Richards testified that she produced the driver’s licence of Leon Payne but she did not produce any document showing the age of Leon Payne even though she knew the Claimant would want to know about the age. Mrs. Samuel was fully aware that Mrs. Richards did not know the age of Leon Payne. This was told to her and she proceeded to estimate his age.

[28] Both Mrs. Richards and Mrs. Samuel are at fault. Even though Mrs. Richards was aware of the importance of the age of the driver she made no effort to ascertain the age of the driver she only took the licence. She signed the form knowing it was very likely the information was incorrect. Mrs. Samuel an experienced insurance personnel of nine years was fully aware that Mrs. Richards did not know the age of the driver. Mrs. Samuel knew that the Claimant would not issue coverage for an “other driver” under the age of twenty-five (25) years, but armed with this knowledge she induced Mrs. Richards to speculate as to the age of the driver by asking how old Leon Payne looked. When she was given an age range of twenties or thirties she determined the year of birth as 1971 and inserted it on

the form. Like in Stone's case the erroneous answer was brought about by the fault of Mrs. Samuel while performing her duty. Also Mrs. Richards was forthright and transparent she told Mrs. Samuel that she did not know the age of the driver. It was Mrs. Samuel who did not discharge her duties properly.

[29] In view of the above I am of the opinion that Mrs. Samuel was the agent of the Claimant. She was authorized to fill out proposal forms, it was part of her duty, and she did so to the "Other Driver's Declaration Form" when parts were left blank by Mrs. Richards. She inserted information which she knew was inaccurate. When she required Mrs. Richards to sign the form after she had filled in the information she led Mrs. Richards to believe that it was not necessary to have the accurate information but an estimate would suffice. In filling in the form she was acting within the scope of her authority. The Claimant cannot rely upon the erroneous answer to avoid the policy.

[30] I find that the Claimant is not entitled to the declarations sought.

[31] The claim is hereby dismissed. The Claimant shall pay the Defendant cost in the sum of fourteen thousand dollars (\$14,000.00).

Gertel Thom
HIGH COURT JUDGE